No. 95-836

Supreme Court, U.S.
FILED
JAN 25 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL J. POSNER, a minor, by his parent, LOUIS J. POSNER,

Petitioner,

—against—

CENTRAL SYNAGOGUE, CENTRAL SYNAGOGUE NURSERY SCHOOL, and MARY SOLOW, as Director of Central Synagogue Nursery School,

Respondents,

—and—

THE UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CENTRAL SYNAGOGUE

MARTIN R. GOLD
GOLD, FARRELL & MARKS
Counsel for Respondent Central Synagogue
41 Madison Avenue
New York, New York 10010
(212) 481-1700

Of Counsel:

MARTIN R. GOLD
ROBERT P. MULVEY

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the collateral estoppel effect given by the federal courts to New York State court judgments finding that the departure of the attorney-petitioner's son from Central Synagogue Nursery School had nothing to do with any alleged "disability", but was the result of his father's refusal to abide by the school's written policy requiring parents to be available during the child's first days at nursery school?

2. Should this Court grant certiorari to determine whether the activities of a private nursery school in following its own internal policies constitute state action in the absence of any claim that the state dictated or influenced such policy, in a case where that issue would be ripe for review only if the collateral estoppel determination were reversed?

3. Should this Court grant certiorari to review the constitutionality of a statutory provision exempting religious organizations from the requirements of the Americans With Disabilities Act, in a case where that issue would be ripe for review only if the collateral estoppel determination were reversed?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Background Facts 1

B. The New York Supreme Court's Decision and Order 4

C. The Decision And Order Of The Appellate Division, First Department 5

D. The District Court Proceedings 7

E. The Decision Of the U.S. Court Of Appeals For the Second Circuit 10

REASONS FOR DENYING THE WRIT 11

A. The Federal Courts Properly Applied Full Faith and Credit To The State Court Rulings 11

B. There Is No State Action Subject To This Court's Review 12

C. The Religious Exemption Contained In the ADA Is Constitutional 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases PAGE

Blum v. *Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777 (1982) 12

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327, 107 S. Ct. 2862 (1987) 14

Gillette v. *United States*, 401 U.S. 437, 91 S. Ct. 820 (1971) 14

Kremer v. *Chemical Const. Corp.* 456 U.S. 461, 102 S. Ct. 1883 (1982)..... 11

Lemon v. *Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971) 13-14

Lynch v. *Donnelly*, 465 U.S. 668, 104 S. Ct. 1355 (1984) 14

Milltex Industries Corp. v. *Jacquard Lace Co. Ltd.*, 922 F.2d 164 (2d Cir. 1991)..... 11

Rendell-Baker v. *Kohn*, 457 U.S. 830, 102 S. Ct. 2764 (1982) 13

United States v. *Lee*, 455 U.S. 252, 102 S. Ct. 1051 (1982) 14

Walz v. *Tax Commission*, 397 U.S. 664, 90 S. Ct. 1409 (1970) 14

Wieder v. *Skala*, 168 A.D.2d 355, 563 N.Y.S.2d 76 (1st Dep't 1990)..... 12

Winters v. *Lavine*, 574 F.2d 46 (2d Cir. 1978)..... 11

PAGE

Statutes and Rules

28 U.S.C. § 1738 11

42 U.S.C. § 1983 13

Americans With Disabilities Act, 42 U.S.C. § 12187 .. 13-14

§ 307 13

N.Y. Civil Practice Law and Rules

Rule § 5501(c) 12

Rules of the Supreme Court of the United States

Rule 43.7 15

STATEMENT OF THE CASE

Petitioners, attorney, Louis J. Posner, and his son, Daniel, petition for certiorari from a judgment of the United States Court of Appeals for the Second Circuit which unanimously affirmed a judgment of the United States District Court for the Southern District of New York, granting respondents summary judgment dismissing the complaint.

This vindictive and frivolous lawsuit has been described by state and federal courts as "vexatious litigation", "bereft of current or prospective support, as well as, common sense" (A. 32)[1], "devoid of merit" (A. 26), an abuse of Mr. Posner's status and privileges as an attorney (A. 27, 32) and "conduct unbecoming a member of the bar" (A. 10). It was commenced in November 1992, after Mr. Posner withdrew his then three-year old son from nursery school following a mere ten days' attendance. The nursery school is a part of Central Synagogue, a Reform Jewish Congregation located in Manhattan. The Petition to this Court adds new misstatements of the facts and of the proceedings below.

A. Background Facts

Prior to the enrollment of their son in the nursery school, the Posners were sent a brochure which set forth the school's policy that parents were expected to remain at the school to help children adapt to first days at school and separation from parents. (A. 3).

During Daniel's first school days, he persistently left the class room for no apparent reason, so the school asked that a parent attend. On October 8, 1992, after Daniel's mother spent one day in the hallway outside of Daniel's classroom, Mr. Posner sent a hand-delivered letter stating that he needed his wife to help him in his law practice, and that she would no longer serve as a "door guard". (A. 3). He stated he was aware

---

[1] References with the prefix (A. __) are to the Appendix accompanying the Petition For Certiorari.

that Daniel was "persistently leaving the class room" (A. 3), but cast blame on the school's policy of keeping the door open. Mr. Posner suggested that the nursery school should alter its policy and close or otherwise secure the door, despite the interests of other children who were experiencing separation problems and had parents available in the hallway in compliance with the policy. Mr. Posner stated he would not send Daniel back to school with a parent as the school had requested, and suggested the school "expel" Daniel and refund the tuition. (A. 3).[2]

On October 9, 1992, Mr. Posner wrote to demand a refund of his unrelated synagogue dues in the amount of $1,175, falsely claiming that membership in Central Synagogue was a condition precedent to his son's admission to the nursery school.

On or about October 14, 1992, Central Synagogue voluntarily refunded to Mr. Posner $3,100 of the $3,250 of Daniel's tuition, and forgave payment on the remaining balance of $1,950. (A. 4).

When Mr. Posner's demands for reimbursement of his synagogue dues were not met, he commenced an action in New York City Civil Court, seeking damages in the amount of $1,175. No claim based on handicap or discriminatory conduct was raised or suggested.

In January 1993, Mr. Posner wrote threatening to amend his Civil Court claim to seek additional damages unless his membership fee was refunded. Mr. Posner claimed that there were

---

[2] Despite the ample record to the contrary, including his own correspondence, Mr. Posner now claims for the first time in this Petition that the door to the classroom was closed during the acclimation period, but that the nursery school thereafter advised his wife "that the door to the classroom would remain open and that she would have to sit alone on a chair in the hallway for 3 1/2 hours a day, 5 days a week, for the remainder of the school year." (Petition at 19). Petitioners do not cite to any portion of the Record for this revisionist, absurd and totally false statement of the case.

"substantial unasserted consequential damages" to his family and his practice of law. His letter advised that Central Synagogue "should be forewarned not to underestimate the substantial amount of time and expense this matter may entail." (A. 4). Again, nothing was said in this letter regarding any claim of discrimination based upon Daniel's "disability."

Mr. Posner thereafter amended the Civil Court complaint, alleging sweeping consequential damages of $22,500. Again, the amended complaint made no reference to any handicap his son might have had, or Central Synagogue's allegedly discriminatory conduct. (A. 4-5).

In March 1993, Mr. Posner wrote Central Synagogue to claim for the first time that Daniel was "handicapped" on the basis of a speech delay, and that this was the cause of his "exclusion" from the nursery school program. He threatened to remove the Civil Court case to New York State Supreme Court and to commence a federal action for compensatory and punitive damages. Mr. Posner threatened that "the cloak of religiosity" would not immunize Central Synagogue from a discrimination law suit. He added that he had observed a "pattern of discrimination" at the nursery school based on his observation that there were no minority students enrolled. He put respondents on notice that "juries in New York County are sympathetic to discrimination suits, are well represented by members of the Black and Hispanic communities, and are known for awarding substantial damages." (A. 5).

On or about March 16, 1993, Central Synagogue offered to refund Mr. Posner's membership fee. Mr. Posner responded by asking "whether [Central Synagogue] would be willing to reinstate Daniel without required parental attendance?" (A. 5). Central Synagogue advised Mr. Posner that it could not agree to his terms because all parents, not just the Posners, were required to stay with their children until the teacher determines that parental presence was no longer necessary. (A. 5).

On March 24, 1993, Mr. Posner rejected the "paltry" offer of $1,175 as "an insult" and again raised the specter of additional lawsuits, warning that "at some future date," he intended to commence actions seeking damages "in excess of One Million ($1,000,000) Dollars." (A. 5-6).

On April 15, 1993, plaintiffs commenced the present federal action, alleging that Central Synagogue failed to accommodate Daniel's speech delay, which he claimed is a disability within the meaning of The Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.*, The Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.*, and the Americans With Disabilities Act ("ADA"), all purportedly in violation of 42 U.S.C. § 1983. (A. 2-3). The complaint sought damages in excess of $12 million.

Mr. Posner then moved to remove the Civil Court action to New York State Supreme Court and to amend the state complaint to allege that Central Synagogue unlawfully discriminated in violation of the New York Human Rights Law when it allegedly expelled Daniel, a "handicapped" individual, from its nursery school. Central Synagogue cross-moved to dismiss plaintiffs' proposed amended complaint.

B. The New York Supreme Court's Decision and Order

On October 12, 1993, New York State Supreme Court Justice Burton Sherman denied Mr. Posner's motion to remove and amend his Civil Court action. The Court found, in relevant part, that "[Mr. Posner's] thesis . . . that defendant violated Executive Law § 296(4) by denying Daniel the use of its facilities because Daniel had a speech disability . . . . [was] bereft of current or prospective support, as well as, common sense." (A. 32). The Court went on to find the following dispositive facts:

> "Daniel was 3 years old. The nursery school has a policy of keeping the door to the classroom open so that the children could go to the bathroom, as well as see their parents in the hallway until it was determined that parental proximity was no longer necessary. It is undisputed that Daniel Posner frequently ran out of the classroom. Mr. Posner wanted the classroom door closed. He did not get his way and as a result he withdrew Daniel from nursery school. The vexatious litigation he instituted thereafter is described above. He started with a simple suit to recover his $1,775 [sic] membership fee which he escalated to a federal action for $12,000,000.00. This court will not encourage Mr. Posner's further abuse of his position and privileges as an attorney." (A. 32).

In response to this decision, Mr. Posner attacked the judge and opposing counsel. He frivolously and falsely claimed that they had colluded because counsel had obtained an unsigned copy of the court's decision. Even after counsel for respondents provided Mr. Posner with documentary proof that they had obtained the decision through a commercial lawyers' service, he pursued baseless charges against opposing counsel and Justice Sherman before disciplinary authorities. These charges were dismissed.[3]

C. The Decision And Order Of The Appellate Division, First Department

Mr. Posner then appealed to the Appellate Division, First Department, attacking Justice Sherman's opinion as: "judi-

---

[3] The *New York Law Journal* published a front-page article quoting verbatim excerpts from Justice Sherman's opinion. Unrestrained by the First Amendment or the privilege for accurate reporting of judicial proceedings, Mr. Posner sued the *Law Journal* for defamation. *Louis J. Posner, Esq.* v. *The New York Law Journal Publishing Co., et al.*, Supreme Court, New York County, Index No. 94/130085. The court dismissed the action and imposed a $1,000 sanction against Mr. Posner.

cial[ly] insensitive" and "inane"; "mindless[ ]," "callous[ly] indifferen[t]", and referring to the decision as a "highly-biased, unsubstantiated, illogical and premature determination", a "reprehensible display of judicial ineptitude" containing a "one-sided account of the litigation practices by the parties" and the "outrageous accusation" that the discrimination claim is meritless.

He continued to advance his paranoid theories of collusion on appeal, alleging that Central Synagogue and/or its counsel "improperly influenced" the court below. His brief on that appeal stated:

> "one cannot ignore the fact that defendant Central Synagogue is an influential and powerful organization with far reaching tentacles, whose congregation includes several hundred attorneys, many of whom are partners in mid-size and large law firms in New York City."

The Appellate Division, First Department, unanimously affirmed Justice Sherman's decision, directed Mr. Posner to pay costs, and dismissed plaintiffs' claims of collusion and improper influence as being "without merit." *Posner* v. *Central Synagogue*, 202 A.D.2d 284, 609 N.Y.S.2d 195 (1st Dep't 1994). The Appellate Division, which reviews facts as well as law, found that Mr. Posner's proposed amended complaint, alleging discrimination, was "plainly lacking in merit." (A. 26). It stated:

> "In denying leave to amend plaintiffs' Civil Court complaint for breach of contract, the IAS court properly determined, based upon the record and documentary evidence, that the proposed amendment, seeking to allege that the defendant, a tax-exempt, non-profit religious institution, had discriminated against three year old Daniel, a child with a disability, in violation of the New York Human Rights Law (Executive Law § 296[4]) by allegedly expelling the child from the defendant's nurs-

> ery school, was devoid of merit and patently insufficient on its face." (A. 26).

With regard to the sanctions imposed upon Mr. Posner by Justice Sherman, the Appellate Division found that such sanctions were appropriate,

> "since he abused his position and privileges as an attorney by instituting the underlying vexatious litigation seeking to recover a $1,775 [sic] membership fee, which he thereafter escalated into a $12,000,000 Federal action when the defendant, for legitimate reasons, refused to yield to his demands." (A. 27-28).

Petitioners' motion for leave to appeal to the New York Court of Appeals was dismissed. *Posner* v. *Central Synagogue*, 83 N.Y.2d 953, 615 N.Y.S.2d 878 (1994). (A. 34).

D. The District Court Proceedings

Central Synagogue moved to dismiss the federal action pursuant to Rule 12(b)(6), Fed. R. Civ. P., and for sanctions pursuant to Rule 11, Fed. R. Civ. P. The district court, Hon. Leonard B. Sand, U.S.D.J., converted the motion to one for summary judgment. In his Memorandum of Law In Opposition, Mr. Posner resorted again to offensive rhetoric, claiming that Central Synagogue had "excluded" Daniel because the Synagogue and its members were, "such elitist snobs that they would rather be subject to a suit for unlawful discrimination, than to be 'tainted' with having a disabled child among their ranks." Mr. Posner then went on to make the outrageous claim that, "[i]n fact this air of exclusivity reeks of the same demented mentality as Nazis seeking a pure Aryan race."[4] In the same memorandum, Mr. Posner acknowledged

---

[4] On this Petition, Posner similarly states that "In Manhattan's east side it is standard practice for preschools to discriminate against children with disabilities" (Petition at 14), as if such an outrageous allegation were a matter of which this Court might take judicial notice.

that he had sought removal of the state action and instituted the federal action, not because of any claim of discrimination, but because of Central Synagogue's "arrogance and intransigence" in failing to yield to his demands.

Recognizing that Central Synagogue was within the religious exemption of the ADA, Mr. Posner interposed a frivolous constitutional challenge to the exemption. This obligated Judge Sand to certify the matter to the United States Attorney General and afford the government an opportunity to intervene, which it did, filing a brief in support of the constitutionality of the religious exemption contained in the ADA.

On December 1, 1993, Mr. Posner served a sur-reply brief in which he continued his verbal assault and *ad hominem* remarks, claiming that Central Synagogue's attorney, who was expecting her first child, "has gone so far as to wag her pregnant belly before the Civil Court judge to request an extended adjournment."[5]

On September 19, 1994, Judge Sand applied full faith and credit to the state court determination, in accordance with 28 U.S.C. 1738, and granted defendants summary judgment on all claims.

> "The critical problem with Mr. Posner's action in this court is that two New York state courts have already found that the facts surrounding [Mr. Posner's] claim of discrimination against his son cause his claim to be completely meritless. These prior determinations preclude Mr. Posner from relitigating the discrimination question in this court." (A. 15).

---

[5] In a similarly offensive vein, Mr. Posner was quoted, in a November 7, 1993 *New York Newsday* article regarding this litigation entitled "Dad Slams Closed-Door School Policy" as saying that Central Synagogue's counsel "[a]re the types of attorneys who know how to turn rape victims into sluts."

In reaching its determination, the district court searched the record in both state court proceedings and determined that:

> "In our view there is little doubt that the Supreme Court's denial of the motion to amend, as well as the appellate court's affirmance, amounted to a finding that, on the underlying facts, there was no merit to Mr. Posner's state law discrimination claim. It is also clear that Mr. Posner had a fair opportunity to address the merits of his discrimination claim to the state tribunals." (A. 18).

The district court held that based on these prior determinations, it was required to dismiss the claims.

> "Once we accord the state court findings the respect we must, Mr. Posner's federal claims cease to have any basis. All of Mr. Posner's federal claims—be they of constitutional or statutory dimension—depend, at the very least, on a connection between the nursery school's decision not to alter its long-standing 'open door' policy in Daniel's case, on the one hand, and Daniel's speech impairment, on the other hand. If no such connection existed, there could be no discrimination, however broadly or loosely that term is defined. Two New York courts have assessed the merits of Mr. Posner's claim that there was just such a connection; that is, that the defendants discriminated against Daniel because of Daniel's speech disability. Both courts found that the decision to remove Daniel from the nursery school was taken by Daniel's parents as a result of what may best be characterized as Mr. Posner's 'policy dispute' with the school regarding child-care management—a dispute having nothing whatsoever to do with the boy's handicap.
>
> "Simply put, there is no reason to believe that Mr. Posner could succeed on any of his federal claims consistently with the judgment of the New York courts that Daniel's speech disability had nothing to do with the

nursery school's insistence on its 'open door' policy."[6] (A. 19).

Mr. Posner's self-righteous statements in his Petition on behalf of the rights of handicapped children cannot camouflage the fact that this case does not involve any failure to provide access to the disabled, and that his son's alleged disability had nothing whatever to do with the nursery school's insistence on its "open door" policy. (A. 19).

E. The Decision Of the U.S. Court Of Appeals For the Second Circuit

By order and judgment, filed May 30, 1995 (A. 1-10), the Court of Appeals unanimously affirmed the district court's application of full faith and credit and grant of summary judgment, stating "it is abundantly clear that the New York courts would consider the foregoing proceedings to have conclusively resolved the discrimination issue." (A. 8). The Court of Appeals also ruled, in accordance with well settled law, that the activities of a private nursery school which is a part of a religious institution did not constitute state action necessary as a basis for Posner's § 1983 claims.

Although the Court of Appeals declined to assess costs or sanctions, it cautioned "Posner that his conduct is unbecoming of a member of the bar." (A. 10).[7]

---

[6] Because Judge Sand ruled against him, Mr. Posner now also attacks him, accusing him of "acting as though he was counsel for Central Synagogue." (Petition at 31).

[7] Mr. Posner falsely claims that the U.S. Court of Appeals found a "nexus" between his son's disability and the school's policy of keeping the door open. Petition at 35. Such a conclusion would be at odds with the Court's holding. In fact, the Court of Appeals merely noted that Mr. Posner had asserted such a connection. (A. 3).

REASONS FOR DENYING THE WRIT

A. The Federal Courts Properly Applied Full Faith and Credit To The State Court Rulings

Federal courts are obligated to adhere to the requirement in 28 U.S.C. §1738 that they "give full faith and credit to state court judgments," *Kremer* v. *Chemical Const. Corp.* 456 U.S. 461, 475, 102 S. Ct. 1883, 1899 (1982), and must give the same preclusive effect to state court determinations as would be given by the state courts. *Milltex Industries Corp.* v. *Jacquard Lace Co. Ltd.*, 922 F.2d 164, 166 (2d Cir. 1991); *Winters* v. *Lavine*, 574 F.2d 46, 54-60 (2d Cir. 1978).

As the lower courts correctly held, the rulings by the New York State Supreme Court and the Appellate Division, First Department, were factual determinations that there was no merit to the claims of discrimination against defendants. (A. 18). These rulings were fatal to all of petitioners' federal claims. (A. 19).

As the Court of Appeals for the Second Circuit stated, under New York law, "the doctrine of collateral estoppel bars relitigation of an issue where that same issue has necessarily been decided in a prior action and where the party to be barred had a full and fair opportunity to contest the prior decision" (A. 18) (citing *Lanzano* v. *The City of New York*, 202 A.D.2d 378, 379, 609 N.Y.S.2d 891, 892 (1st Dep't), *leave to appeal denied*, 83 N.Y.2d 760, 616 N.Y.S.2d 14 (1994).

Whether a party had a full and fair opportunity to contest the earlier decision is determined by whether the party had adequate incentive to litigate "long and hard." *Winters* v. *Lavine*, *supra*, 574 F.2d at 58-59 n.14. As the Court of Appeals noted, "any doubt as to whether Mr. Posner knew that he was at a point in his litigation where he had to press the merits of his amendment was cured by the later appellate review of the Supreme Court's ruling" (A. 18), and under New

York law, the Appellate Division reviews findings of fact as well as legal determinations. N.Y. Civil Practice Law and Rules § 5501(c).

Mr. Posner's efforts to avoid the preclusive effect of the actions he initiated in the state courts are meritless. His claim that Central Synagogue did not raise collateral estoppel in a responsive pleading ignores the fact that Central Synagogue moved to dismiss instead of filing an answer, and that the district court converted the motion to a summary judgment motion. Posner was given explicit notice that the doctrine of collateral estoppel might be invoked by the district court, and he wrote a letter to the court arguing against its application. (A. 8-9).

Finally, Mr. Posner argues that the denial of a motion to amend should not be given collateral estoppel effect. Under controlling New York law, however, a decision to deny leave to amend a complaint may be a decision on the merits, *Wieder* v. *Skala*, 168 A.D.2d 355, 563 N.Y.S.2d 76 (1st Dep't 1990), and the decisions of the New York State Supreme Court and the Appellate Division in this case left no doubt that the motion was denied because of the meritless nature of petitioners' discrimination claims.

B. There Is No State Action Subject To This Court's Review

Apart from the preclusive effect of the "judgment of the New York courts that Daniel's speech disability had nothing to do with the nursery school's adherence to its 'open door' policy" (A. 19), petitioners' claims under 42 U.S.C. § 1983 fail because Central Synagogue's nursery school was not engaged in state action, under the tests applied by this Court. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777, 2786 (1982).

As Mr. Posner acknowledges, the nursery school is "privately funded" (Petition at 28) and has no contract with the

state. (Petition at 30). Although Mr. Posner argues that the nursery school was licensed and regulated under state law, mere licensing and regulation are insufficient to impute state action where there is no nexus between the state regulation or licensing and the challenged action. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841, 102 S. Ct. 2764, 2771 (1982) (no state action where challenged activity was "not compelled or even influenced by state regulation"). Petitioners have not claimed, and cannot claim, that the nursery school's policy of leaving the classroom door open was an action that could be treated as one of the state itself.

As the Court of Appeals for the Second Circuit stated in rejecting Mr. Posner's § 1983 claims, there are "no cases . . . in which state action was found by a privately funded nursery school" (A. 9), and the cases relied upon by Mr. Posner (Petition at 30) are "factually inappropriate." Mr. Posner interprets this absence of authority as a basis for this Court's intervention, ignoring the more obvious lesson that the independent policies of private nursery schools simply do not constitute state action.

C. The Religious Exemption Contained In the ADA Is Constitutional

Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation. Pursuant to section 307 of the ADA, "the provisions of [Title III] shall not apply . . . to religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. § 12187. Central Synagogue controls the operations of its nursery school, rendering the school statutorily exempt, even if petitioners had a valid claim of denial of reasonable access.

The constitutionality of a statute broadly exempting religious organizations from regulation is subject to the three-pronged test stated by the Court in *Lemon* v. *Kurtzman*, 403

U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "

As this Court held in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 335-36, 107 S. Ct. 2862, 2868 (1987), statutory exemptions for religious organizations from government regulation, such as that contained in the ADA, serve a valid secular purpose under the first prong of the *Lemon* test because they relieve religious organizations from the burden of predicting, under threat of liability, "which of its secular activities a secular court will consider religious."

Under the second prong of the *Lemon* test, the exemption in the ADA neither fosters, nor inhibits religion, but rather is the type of accommodation to religion that the Court has considered constitutionally permissible. *Lynch* v. *Donnelly*, 465 U.S. 668, 677-78, 104 S. Ct. 1355, 1361 (1984); *Walz* v. *Tax Commission*, 397 U.S. 664, 673, 90 S. Ct. 1409, 1413 (1970).

Finally, as this Court has repeatedly held, exemptions for religious bodies from generally applicable statutes do not entangle the government with religious entities, but rather promote separation of church and state. *Amos*, *supra*, 483 U.S. at 339; 107 S. Ct. 2862; *United States* v. *Lee*, 455 U.S. 252, 260 n.11, 102 S. Ct. 1051, 1057 n.11 (1982); *Gillette* v. *United States*, 401 U.S. 437, 91 S. Ct. 820 (1971).

Congress clearly acted within the Constitution and this Court's well-reasoned precedents in enacting the exemption.

CONCLUSION

This Court should deny the petition for certiorari, award respondent's double costs pursuant to Rule 43.7 of the Rules of this Court, and order such other relief as the Court deems appropriate.

Respectfully submitted,

MARTIN R. GOLD
GOLD, FARRELL & MARKS
41 Madison Avenue
New York, New York 10010
(212) 481-1700

Counsel for Respondent
Central Synagogue

Of Counsel:

MARTIN R. GOLD
ROBERT P. MULVEY